The fact of the children tagging along with her each time she moved into a new home supports the respondents' contention that she had more than two children of her own.

4 Correspondence from the deceased to the second respondent, D19, dated 12 December 1949 contains words of advice and encouragement and couched in terms of endearment which only a natural mother is capable of expressing. D19 is authentic as evidenced by the date stamp on the original envelope, D20. This again negatives the applicant's assertion that he is the only natural son of the deceased.

5 At the deceased's funeral, apart from the applicant and his sister, the two respondents were present and so were Kay Hai and Kay Kuan. All were dressed in black with the appropriate headgear and it was Kay Hai who carried the 'dragon lamp' and the deceased's ancestral tablet into the house. If indeed the applicant was the only natural son, one would expect him to carry the lamp and ancestral tablet. Furthermore, the funeral was held five days after the deceased's death to await the gathering of all the relatives as the last one to arrive were the first respondent who only knew of the deceased's death when he was on location duty in the jungles of Pahang and the second respondent who had to come from Singapore. All these evidence point to the fact that the deceased had more than one son to mourn her death.

Taking the evidence in its totality, I am more than satisfied that all that the applicant had succeeded in doing is to produce inconclusive evidence to his claim of being the only natural son of the deceased. On the contrary, there is overwhelming evidence that the applicant had five other brothers, two of whom are the respondents and that they together with the applicant are the natural sons of the deceased. On that finding, the applicant cannot possibly succeed on his motion to have the letters of administration granted to the first respondent evoked, on the ground that the first respondent is not one of the natural sons of the deceased to whom letters of administration should be granted.

Moreover, the 'sufficient cause' required by s 34 of the Probate and Administration Act 1959 has been confirmed by the decision in *Re Khoo Boo Gong, deceased*,[1] as being the undue and improper administration of the estate in total disregard of the interests of the beneficiaries. In this case, the applicant has not even alleged any mismanagement on the part of the first respondent as an administrator. He had not objected when the letters of administration were applied for by the first respondent and the grant obtained and extracted in 1974.

He could easily have done so, as on his own admission, he was already made aware since 1968, that he was the only natural son of the deceased. The present motion was filed in 1986, and to object to such a grant 12 years after it was obtained without sufficient cause or reason is indeed an act of blatant mischief on the applicant's part. Since the estate is in the final stage of winding up and as there is no evidence of mismanagement on the first respondent's part, I do not consider adding the applicant as a co-administrator an appropriate order to make as this may prolong any action leading to a fast and easy winding up of the estate.

For all the reasons that I have given above, I accordingly dismiss this motion with costs.

Application dismissed.

Solicitors: *Yeoh Kian Teck & Co; Adlan & Haji Suhaimi; Ong & Ong.*

Reported by *PS Ranjan*

United Malayan Banking Corp Bhd v Lim Meng Hua & Ors

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 23-1595 OF 1986
ABU MANSOR J
11 DECEMBER 1988

Banking — Guarantees — Claim for interest after the winding up of principal debtor — Whether entitled to interest as provided under the guarantee — Facility granted carried different rates of interest — Execution of guarantee after facilities granted — Past consideration — Not all guarantors signing prior guarantee signed subsequent guarantee — Whether guarantors liable

Civil Procedure — Summary judgment — Undue delay — Whether triable issues raised — 'Some reason for trial' — Rules of the High Court 1980, O 14

The defendants signed a letter of guarantee and indemnity, in consideration of the plaintiff agreeing to give banking facilities to a company, to pay on demand to the plaintiff all sums owing by the company to the plaintiff up to $519,000 and interest. The company also charged its land to the plaintiff. The company was wound up in June 1983 and presumably the land was sold and proceeds applied to outstanding debts of the company. The plaintiff then commenced this action against the defendants to recover the balance of $452,104.43, interest at 14.5% pa on monthly rests from 1 October 1986 until judgment and costs. The application for summary judgment was dismissed and the plaintiff appealed.

The plaintiff contended that (1) as the second and third defendants had not filed affidavits, judgment should be given to the plaintiff; (2) the winding up of the company did not release the guarantor and his obligation to pay interest; and (3) assuming that interest ceases after the winding up of the company, the letter of demand which was sent to the company for $298,423.15 together with interest of $51,324.27 and produced in the fifth defendant's affidavit was an admission.

The second, third and fourth defendants contended that (1) the learned senior assistant registrar's decision necessarily meant that there were triable issues and should apply equally to all the defendants; (2) the facility which was payable in instalments carried different rates of interest for different facilities and the claim cannot be for 14.5% pa; (3) the plaintiff lent $519,000 well before the execution of the letter of guarantee; (4) the guarantee dated 24 January 1978 had five persons as guarantors whereas the later guarantee dated 28 April 1980 had only four persons, and in order to bind all guarantors on both the guarantees, they should be the same; (5) when the guarantors executed the second guarantee, there was past consideration; and (6) the receiver was only entitled to charge 5% fees but was paid $58,000 from the proceeds of $241,000. As such, the plaintiff's failure to observe all the provisions did not help to reduce the amount in dispute. The fifth defendant adopted generally the submissions of the second to fourth defendants and further contended that (1) no interest should be paid after the company was wound up and the rate should not be what the plaintiff claimed; (2) there was no provision in practice to allow interest to continue even after winding up; (3) cll 3 and 7 of the guarantee did not support the contention that interest ran after winding up and if interest was to continue, it must be so worded; (4) if interest was stopped against the principal debtor, then it should also stop against the guarantor unless provided otherwise; and (5) there was undue delay arising from several factors including the sale of the property and the right to impose penalty interest.

Held, dismissing the plaintiff's appeal with costs:

(1) The defendants had raised a triable issue as to whether interest continues to accrue and the defendants continue to be liable to the plaintiff for interest accruing even after the principal debtor company had been wound up.

(2) Further, in view of the complicated nature of the plaintiff's claim, the matter should go for trial as there were some other matters raised by the circumstances which called for trial.

Cases referred to

1 *Lim Kok Chee* v *Chong Fatt* [1986] 2 CLJ 305 (refd)
2 *Re Fitzgeorge, ex p Robson* [1905] 1 KB 462 (refd)
3 *United Malayan Banking Corp Bhd* v *Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In Liquidation) & Anor* [1986] 1 MLJ 75 (refd)

Legislation referred to

Rules of the High Court 1980 O 14

Tan Kiah Teck for the plaintiff/appellant.
Loh Song Chuan for the second, third and fourth defendants.
Reginald Vallipuram for the fifth defendant.

Cur Adv Vult

Abu Mansor J: This is an appeal against the judgment of the learned senior assistant registrar on 9 January 1988 dismissing the action of the plaintiff/appellant against the defendants/respondents under O 14 of the Rules of High Court 1980.

The plaintiff is a bank. On 28 April 1980 the defendants signed a letter of guarantee and indemnity in which they agreed that in consideration of plaintiff's agreeing to give banking facilities from time to time to Soon Hup Heng Sdn Bhd ('the company'), the defendants would guarantee to pay the plaintiff on demand all sums owing to the plaintiff by the said company up to the extent of ringgit $519,000 as principal and additionally for interest.

The company also charged its land ('the said land'). In accordance with the guarantee the plaintiff gave banking facilities to the company up to the time the company was wound up on 29 June 1983. Presumably as the company defaulted the said land was sold pursuant to a court order.

Out of the proceeds of sale, the plaintiff applied the proceeds towards payment of the company's outstanding debts and less expenses, the company's debt stood at $452,104.43.

The plaintiff then claimed from the defendants and after the various demands, the defendants failed and still fail to settle the debt due from the company to the plaintiff. The plaintiff then brought this action against the defendants to recover the $452,104.43 by his writ dated the 2 December 1986.

By their summons-in-chambers dated 2 February 1987, the plaintiff applied for summary judgment under O 14 against the second, third, fourth and fifth defendants for the sum of $452,104.43 as at 30 September 1986 with interest at 14.5% pa on monthly rests from 1 October 1986 until judgment and thereafter the usual interest and cost.

The learned senior assistant registrar dismissed the application on two grounds, namely, that the company was wound up on 23 June 1983 and therefore interest against the guarantors should rightly cease from that date. Secondly, the learned senior assistant registrar should have held that the application of $241,000 out of the proceeds and distribution thereof was not satisfactorily done.

On ground one, the appellant's counsel contended that the second and third defendants did not file any affidavit but only the fourth defendant filed. Since they did not do so, judgment should have been given for the plaintiff. He cited *Lim Kok Chee* v *Chong Fatt*[1] at p 306 which affirmed the standing practice that the defendant in an O 14 application has to show cause by an affidavit or otherwise to the satisfaction of the court. Mr Loh for the second, third and fourth defendants, however says the affidavit filed by the fourth defendant was on behalf of himself and the second and third defendants.

The plaintiff says that the winding up of the company does not release the guarantor. Counsel cited *Rowlatt on Principal and Surety* (4th Ed), p 211 which says that there is no reason to suppose that the appointment out of court of a receiver by a debenture-holder even in the case of an insolvent company would have the consequence of discharging a surety. Appellant's counsel cited *Re Fitzgeorge, ex p Robson*[2] where Bigham J held that the obligation of the debtor to pay interest on the debenture under the guaran-

tee remains even after the company has been wound up. In cll 3 and 7 of the guarantee (encl (7)), the plaintiff is thereby empowered to prove in any bankruptcy the whole amount outstanding. Clauses 3 and 7 of the guarantee attached to encl (7) are as follows:

> 3 Should the customer(s) become bankrupt or insolvent you may prove in such bankruptcy for the whole amount outstanding against him/them on such general balance and no money or dividend so received by you shall be treated as received in respect of this guarantee and indemnity or otherwise in relation to me/us but the full amount to which this guarantee and indemnity extends shall be payable by me/us until you shall have received from all sources one hundred cents in the dollar on the ultimate balance outstanding against the customer(s). After you have received such ultimate balance in full any claim on my/our part to any excess or to any securities remaining in your hands shall be a matter of adjustment between you and me/us and any other person or persons laying claim thereto.
>
> 7 My/Our liability hereunder shall not be nullified diminished or altered by the fact that for any reason whatsoever (whether known to me/us or not) I/we am/are hereby constituted or may hereafter be or become the principal debtor(s) or primarily and/or solely liable for payment of the moneys by cl 1 above agreed to be paid and that this agreement may in fact or at law be one of indemnity and not of guarantee and that notwithstanding that the customer(s) has/have at law no power or authority to borrow or is/are an unincorporated body or other association having no legal existence or that for any other reason it may be or become impossible to proceed against the customer(s) hereunder.

Plaintiff's counsel argues that assuming that the interest ceases after the winding up of the company, the defendants have to contend with para 6 of encl (11) that by a letter of demand dated 1 February 1982, KKB2 was sent by the plaintiff to the principal debtor for payment of the sum of $298,423.15 for principal sum and a sum of $51,324.27 for interest. Enclosure (11) is the affidavit of the fifth defendant and plaintiff's counsel says this constituted an admission.

Mr Loh on behalf of the second, third and fourth defendants submitted that the decision of the learned senior assistant registrar necessarily means that she has found there are triable issues to be tried. The decision must equally apply to the second to fourth defendants.

Counsel for the second to fourth defendants, while conceding that as according to para 5(2) of encl (12) the principal debtor (the company) was given a facility of $134,025.00, contended that the facility as in exh A encl (12) payable in 84 instalments carried different rates of interest for different facilities and the fixed loan was due to expire on 20 November 1980. In para 9 of encl (12), the fourth defendant contends that the plaintiff lent $519,000 to the company well before the execution of the letter of guarantee.

Counsel also submitted that in MA-4 encl (14), the guarantee was dated 24 January 1978 for $250,000 and five persons stood as guarantors whereas in encl (7) para 3 in MA-2 dated 28 April 1980, there were four guarantors. Counsel submitted in order to bind all guarantors on the first and second guarantees, they should be the same guarantors. Counsel also submitted that when the guarantors executed the second guarantee, these guarantors executed the guarantee on a past consideration — the first guarantee being up to December 1979 against a total sum advanced of $134,025. He submitted that past considerations is no consideration and the defendants should not be held to be liable.

As regards interest, counsel says there are five facilities granted to the company. In the plaintiff's statement of claim, the plaintiff claims 14.5%. As the facilities carried different rates of interest, the claim can never be 14.5%.

In encl (17) para 6 p 4, counsel submitted that in the debenture the receiver is only entitled to charge 5%. However, the receiver was paid $58,000 from the proceeds of $241,000. These fees exceeded 5%. Counsel cited *United Malayan Banking Corp Bhd* v *Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In Liquidation) & Anor*[3] at p 83 where it was held that payment of the receiver should be according to the debenture unless there is in existence other statutory priorities. Counsel submitted the plaintiff's failure to observe all these provisions does not help to reduce the amount in dispute. Their observation will otherwise have proportionately reduced the guarantors' liability to the plaintiff. Counsel for the second to fourth defendants submitted that by these points which he had raised, he had succeeded in showing that there are triable issues.

Mr Reginald Vallipuram on behalf of the fifth defendant, I think, adopted the submission of the second to fourth defendants' counsel. He however contended that his client should not be made to pay interest after the principal debtor (company) was wound up on 28 June 1983. He further contended that the interest should not be as per the plaintiff's claim. The sum due from the principal debtor on 18 March 1983 was $396,900.44 (para 6 of encl (17)). Counsel says that vide exh B encl (17), the account of the receiver para 8 shows that the amount owing under the instrument at the date of the receiver's appointment was $396,980.44. Counsel argued that if the appointment was on 18 March 1983 and the principal debtor was wound up on 23 June 1983, by adopting a flat rate 14.5% pa for the three months, it would still be $411,300.70. The figure on this claim on 30 July 1986 is $454,104.34. The property of the principal debtor was disposed of at $241,000 and a net sum of $170,000 was received by the plaintiff. Yet the amount due from the guarantors was $452,104.34. Counsel says if we add the amount of the claim and the sum outstanding at the winding-up order — $411,370 — the increase in the amount due is $40,000. If we add $170,000 counsel says it

becomes apparent that the company has charged something like $210,000 since the company was wound up. He submitted that the issue was whether the company can impose interest since the date it was wound up. Counsel submitted that there is no provision in practice to allow interest to continue even after winding up. Counsel for the fifth defendant contended that the terms of cll 3 and 7 of guarantee encl (7) do not support the contention of the appellant that interest still runs after a winding up. In his view the answer appears to be in para 4 of the guarantee to the limit of amount stated in para 4 (subject always to $519,000). He argued further that unless there is anything in the guarantee that interest would continue even after winding up, then the guarantee would have to be differently worded. In para 4 of the guarantee, interest is to run from the date of demand made, which is 28 October 1986. He cited p 72 of the textbook entitled *Legal Problems of Credit and Security* by Professor RM Goode and quoted:

> Impact of debtor's bankruptcy on surety's liability
>
> (1) In general, liability is unaffected
>
> The bankruptcy of the principal debtor does not as a general rule affect the creditor's rights against the surety. The creditor may lodge a proof in the bankruptcy for the full outstanding balance of the debt and simultaneously sue the surety to judgment, and enforce such judgment to the extent to which the creditor has not received a dividend from the estate. Even the discharge of the debtor does not affect the surety's liability. This is expressly provided by s 28(4) of the Bankruptcy Act 1914.
>
> (2) Interest accruing after receiving order
>
> Some care needs to be taken in regard to the interest clause in the guarantee. If interest is expressed to be payable 'so long as any amount is due from the debtor', the right to charge interest to the surety apparently terminates with the debtor's bankruptcy, at which point the debt ceases to be legally recoverable from him. This result can be avoided by stipulating that interest is to run against the surety 'until payment' of the amount due from the principal debtor.

Counsel submitted that he has succeeded in raising a triable issue as to whether in law a guarantor is liable to pay interest even after the winding up of the principal debtor company which hinges on the interpretation of cl 4 of the guarantee agreement. If his interpretation of cl 4 was correct, the demand being made on 28 October 1986 is more than 500% of the amount being claimed in court. He submitted that if the interest stops against the principal debtor then fairly it should also stop against the guarantor unless there is provision in the guarantee on the outstanding amount. This is not saying that the guarantor is discharged after winding up but the issue is whether he is liable for interest after winding up. The case of *Re Fitzgeorge*[2] cited by the plaintiff can and should be distinguished by going back to the terms of our present guarantee signed by the defendant guarantors.

On the fees of the receiver amounting to $58,585.70, Mr Reginald Vallipuram contended that what the receiver is entitled for work done was 5% under the debenture deed cl 11 p 5 of exh A. He says 5% of $241,000 is only $12,040 but the receiver has collected $58,585.70 as fees; there is then an excess of $41,000 which amount by right should go to reduce the liabilities of the principal debtor.

I am satisfied that the defendants have been able to raise a triable issue whether, on a proper construction of the guarantee, interest continues to accrue and the defendant guarantors continue to be liable to the petitioner for the interest accruing even after the principal debtor company had been wound up. I agree that there is question of law to be decided at the trial.

Apart from my finding that there is an issue on a question of fact and law for trial, I also find that there should also be a order for trial under the heading of 'Some other reason for trial'. In *The Supreme Court Practice* (1985 Ed), at pp 139 and 140 under the heading of 'Summary Judgment' it says:

> Some other reason for trial — The former O 14 r 1 provided that the defendant should have leave to defend if he 'shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally'. These words were replaced in r 3(1) by the words that the defendant should have leave to defend if he satisfies the Court 'that there ought for some other reason to be a trial' of the claim or part to which the summons for judgment relates. These words, if anything, are wider in their scope than the former. It sometimes happens that the defendant may not be able to pin-point any precise 'issue or question in dispute which ought to be tried', nevertheless it is apparent that for some other reason there ought to be a trial (see per Megarry J in *Miles* v *Bull* [1969] 1 QB 258; [1968] 3 All ER 632), eg that the plaintiff is incapable of giving or has not given a retainer to bring the action (see *Daimler Co Ltd* v *Continental Tyre and Rubber Co Ltd* [1916] 2 AC 307, per Lord Atkinson p 326 and per Lord Parker at p 346) or that the defendant reasonably and properly requires to interrogate or cross-examine the plaintiff (see *Harrison* v *Bottenheim* (1878) 26 WR 362) or that the defendant is an executor or administrator who can raise facts by reference to the existence or absence of letters, accounts or such like of the deceased which make it reasonable to require full discovery of documents so that there ought to be a trial. Whenever there are circumstances which require to be closely investigated there ought to be a trial and judgment should not be given under O 14 (*Miles* v *Bull* [1969] 1 QB 258; [1968] 3 All ER 632, applying the language of Lord Parker in the *Daimler* case). See also *Crump* v *Cavendish* (1880) 5 Ex D 211, per Thesiger LJ, p 214.
>
> Circumstances which might afford 'some other reason for trial' might be, where, eg the defendant is unable to get in touch with some material witness who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the plaintiff's case tended to show that he had acted harshly and unconsciously and it is thought desirable that if he were to get judgment at all it should be in the full light of publicity (see per Cairns LJ in *Bank fur Gemeinwirtschaft Aktiengesellschaft* v *City of London Garages* [1971] 1 WLR 149, at p 158; [1971] 1 All ER 541, at p 548, CA).

Mr Reginald Vallipuram submitted that the accumulation of interest, if the defendants are made liable, was as a result of undue delay in pursuing the claim by the appellant. These were the following factors that contributed to the delay:

(i) The receiver was supposed to have sold the property in August 1983 at a reserve price of $340,000.

(ii) Since a third party had an unsecured judgment against the principal debtor, the appellant had to apply for an order for sale. The bank was finally successful in getting an order to dispose (see *United Malayan Banking Corp Bhd* v *Official Receiver & Liquidator of Soon Hup Seng Sdn Bhd (In Liquidation) & Anor*[3]). The property was only eventually sold on 19 April 1986 when the price dropped to $210,000 only.

Due to the effect of all these, the defendants not only have to bear the difference but also the accumulated interest after the winding up if the defendant is found to be liable. All this time, the appellant made no demand on the defendant, demand being made only in 1986. Counsel submitted that the appellant bank should claim in damages.

(iii) Penalty interest. In the claim, the plaintiff has imposed a penalty interest of $82,976.10. The question is whether the appellant could impose a penalty interest on the principal debtor. In the letter of offer KBK-1 p 4 of encl (18) there was no provision made for penalty of interest. The appellant having taken $82,976.10 and also after taking $72,117.20 in accumulated interest having only a small balance to reduce the principal amount. The fifth defendant raised in para 4 of his affidavit in encl (18) that while the appellant is empowered to increase interest, the interest of 14.5% pa was excessive and unconscionable and the court ought to have it reviewed.

(iv) The fifth defendant also has a complaint against the appellant's imposition of interest at a flat rate of 14.5% pa on all facilities. He submitted that this is also wrong. The rate is different from the rate given in the letter of offer KBK-1 p 2. Different rates was given for different facilities, eg the secured overdraft was based on the prime lending rate. If base lending rate was 7.5%, on secured overdraft interest could be 11% and interest on trust was 8.5% but in spite of these different rates the appellant claimed in statement of claim a flat rate of 14.5% on fixed loan and overdraft balance.

(v) Again the defendants contended that the appellant had acted unfairly in converting interest at 14.5% pa as per ABA-4 and ABA-5 encl (22) into 14.5% at monthly rest as stated under the heading item (b) in the statement of claim. The defendants contended this is claiming interest at a higher rate if defendant is made liable. If everything is considered, the defendants' counsel contended that the bank's claim is fraught with uncertainties as the question can be asked, what is the real amount due to appellant?

(vi) As to the certificate being a final document as to the state of defendants' indebtedness, the defendants' counsel submitted that the certificate is based on the state of the appellant's accounts. He submitted that the defendants have shown manifest error in the account on which the certificate is based.

In view of the complicated nature of this claim, I make a finding that the matter should also go to trial under the heading of 'some other reason for trial'.

For the reasons given, I make an order dismissing this appeal with costs to the defendants to be taxed.

Order accordingly.

Solicitors: *Tan & Tan; Vincent Lai & Co; Reginald Vallipuram & Co.*

Reported by *Yap Shao Sin*

Ling Tee Huah Credit & Leasing Sdn Bhd & Ors v Lii Tat Credit Mortgage Sdn Bhd & Anor

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 23 OF 1988
CHONG SIEW FAI J
30 MARCH 1989

Land Law — Caveat — Application to remove — Locus standi of applicants — Loan agreement — Legal disability — Registrable interest — Interpretation — Whether consent of chargee required — Land Code (Sarawak) (Cap 81), ss 177(1), (2) & 173(a)

The second to eighth plaintiffs and the second defendant were registered owners of a parcel of land described as lot 3206 Seduan Land District, Sibu, each holding 1/8 undivided share. All the eight co-owners charged the land to the first plaintiff which was registered at the Sibu Land Registry Office on 21 February 1986. The charge contained a covenant against dealing during the existence of the charge. On 27 February 1987, a loan agreement was entered into between the first defendant as lender and the second defendant as borrower under which the latter borrowed from the first defendant a sum of $60,000. The said loan agreement contained a clause allowing the first defendant to caveat the second defendant's lands then or thereafter acquired. On 14 March 1987, a caveat was so lodged by the first defendant without the consent of the first plaintiff as prior chargee. On 16 October 1987, the said land lot 3206 was subdivided into eight lots each with a separate land title with the second to eighth plaintiffs and the second defendant each holding 1/8 undivided share in each of the eight lots and the caveat lodged by the first defendant was duly registered. The plaintiffs applied to remove the caveat.

Held, allowing the plaintiffs' application:

(1) On the first defendant's contention that the first plaintiffs had no locus standi, the court held that the first plaintiff was entitled to make this application as a registered chargee and came